NEOH CHENG KIM

v.

GOH AH HOCK

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[ORIGINATING SUMMONS NO. 24(31)-608-87]
24 FEBRUARY 1990

FAMILY LAW: *Interim order for custody and guardianship - Maintenance of wife and children - Law Reform (Marriage and Divorce) Act 1976 - Sections 77, 88, 93 - Welfare of the child - Status quo - Children staying together - Unsuitability of living conditions - House or flat - Expenses.*

The parties in this case were married in 1973 and had four children of the marriage aged 15, 12, 10 and 8 years old respectively. Around February 1987, the plaintiff left the matrimonial home and lived with her brother and later her father. The children remained with the defendant. The plaintiff sought an interim order for custody and guardianship of the four children and maintenance for herself and the children.

Held:

[1] The law on the custody and guardianship of children is contained in s. 88 of the Law Reform (Marriage and Divorce) Act 1976 (the Act); in deciding the issue of custody, the paramount consideration shall be the welfare of the child and subject to this, the Court shall have regard to the wishes of the parents and of the child who is of an age capable of expressing an independent opinion.

[2] Taking into account the evidence of the parties and the children themselves (who are attached to one another and happy in the matrimonial home) the *status quo* of the children should be preserved; bearing in mind that this is an interim order only. The Court did consider the question of splitting the children, however in view of the fact that the children have been together all along, it would not be conducive to separate them as this may affect them emotionally.

[3]The children's interest and welfare are better served by them remaining with the defendant at the matrimonial home.

[4] Section 77(1)(a) of the Act relates to matrimonial proceedings commenced under Pt. VI of the Act, namely petitions for divorce, judicial separation and nullity of marriage. Since this was an application for custody and guardianship which does not fall under Pt. VI of the Act, the plaintiff cannot be granted relief by way of maintenance.

[Application dismissed with costs.]

Cases referred to:
J. & Anor. v. C. & Ors. [1970] AC 668
Mahabir Prasad v. Mahabir Prasad [1982] 1 MLJ 189

Legislation referred to:
Law Reform (Marriage & Divorce) Act 1976, ss. 77(1)(a), 88

For the plaintiff - Mary Yeo Chew Yen; M/s. Lim Kean Siew & Co.
For the defendant - David Choong Ewe Leong; M/s. Lim, Lim & Oon

JUDGMENT

Mohamed Dzaiddin J:

This is an application of the wife for an interim order for custody and guardianship of four children of the marriage with reasonable access to be given to the husband and for reasonable maintenance for herself and the four children to be paid by the husband.

The Facts:

The plaintiff and the defendant were married on 5 July 1973 at Pulau Pinang and had cohabited and lived together at No. 538 R, Pekeliling Sempadan, Air Itam, Pulau Pinang (the matrimonial home). They had four children of the marriage, (three sons and one daughter). The eldest is a son, now 15 years and 9 months old, the second and the third are also boys, who are 12 and 10 years old respectively. The youngest child is a daughter who is only about 8 years old. They are now attending school. By her affidavit affirmed on 1 July 1987 the plaintiff deposed that on 18 February 1987 she left the matrimonial home because her husband was committing adultery with one Rosalind Lee Beng Choo. The plaintiff alleged that the defendant used to take Rosalind back to the matrimonial home and stayed overnight. Despite her objection, the defendant took no steps to prevent Rosalind from using the house, nor did the defendant discontinue his relationship with her. After leaving the matrimonial home, the plaintiff stayed with her brother at No. 15, Lebuh Binjai Dua, Taman Sri Rambai, Bukit Mertajam. But the four children remained with the defendant because she was unsure of her new address and did not wish to disrupt their education. Under cross-examination on her affidavit, the plaintiff told the Court that she now lives with her father at No. 16, Sixth Floor, F Block, Rifle Range Flat. Air Itam. It is a one-room flat and unsuitable for her children. However, if custody of the four children was granted to her she would rent a suitable place where she could take good care of the children. She would also arrange for them to go to school by school buses. Presently, she is working as a seamstress at Dragon and Phoenix Bhd., with an income of RM300 per month. Her working hours are from 8.00 a.m. to 4.30 p.m. and at times she does overtime until 6.00 p.m. She agreed with defendant's Counsel that she would have to stop work to look after the four children and she would not get any more income. However, she stated that with the maintenance to be provided by the defendant, she would be able to take care of the children. Finally, she agreed that the four children were quite comfortable staying at the matrimonial home.

On the issue of maintenance, the plaintiff stated in her affidavit that she used to receive from the defendant RM700 per month as maintenance for the family. However, between October 1986 until January 1987, the maintenance was reduced to RM600 per month. She claimed that the defendant being a building contractor was earning a monthly income of RM5,000. In the circumstances, the plaintiff felt that it was reasonable that he should be ordered to pay a monthly maintenance of RM1,000 for herself and the four children.

The defendant affirmed an affidavit in reply on 26 July 1987. First, he denied the plaintiff's allegation that he had committed adultery with Rosalind Lee Beng Choo. Secondly, he averred that Rosalind was their mutual friend and asserted that her frequent visits to the matrimonial home for over a period of three years and even sometimes staying overnight had been with the consent, knowledge or at the invitation of the plaintiff. Thirdly, he stated that he had tried in vain to persuade the plaintiff to return to the matrimonial home with the help of his relatives and promised that for the sake of the children and to prevent further misunderstandings between him and the plaintiff, he was prepared to discontinue seeing Rosalind Lee and to prohibit her from visiting the matrimonial home. Under cross-examination

by Miss Yeo, the defendant reiterated that Rosalind had stopped visiting the matrimonial home. However, on suggestions by Counsel that he was seen every night since July 1987 to fetch Rosalind at Rifle Range flat and again on 15 May 1988 having dinner with her at the coffee shop at Caunter Hall, the defendant merely denied the suggestions.

On maintenance, he explained that the amount was reduced to RM600 per month because the services of a household cleaner had been terminated and there was no need for extra tuition fees for one of the children. He further averred that as a contractor he never earned more than RM5,000 per month. In fact, for the years 1984, 1985 and 1986 his business suffered losses.

Finally, on the question of custody of the children, the defendant admitted that the plaintiff had taken care of the children to the best of her ability whilst she was living at the matrimonial home. He felt that the children would be deprived of a suitable place and environment if they were taken away from the matrimonial home. Hence, for the sake of the children, he still wanted the plaintiff to return to the matrimonial home.

Perhaps, I should mention here that during the course of the proceedings I saw the four children privately in chambers and ascertained from the eldest son with whom they wanted to stay. He was quite emphatic that they wished to remain with the defendant.

The Law

The law on the custody and maintenance of children is well settled. The Law Reform (Marriage & Divorce) Act 1976 (Act 164) empowers the Court at any time to grant an order for custody and to pay maintenance for children of the marriage. With regard to custody, s. 88 provides as follows:

> (1) The Court may at any time by order place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare or to any other suitable person.
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> (2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the Court shall have regard:
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> (a) to the wishes of the parents of the child; and
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> (b) to the wishes of the child, where he or she is of an age to express an independent opinion.
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> (3) There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the Court shall have regard to the undesirability of disturbing the life of a child by changes of custody.
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> (4) Where there are two or more children of a marriage, the Court shall not be bound to place both or all in the custody of the same person but shall consider the welfare of each independently.

It seems clear from sub-section (2) that in deciding in whose custody a child should be placed, the paramount consideration shall be the welfare of the child and subject to this, the Court shall have regard to the wishes of the parents and of the child who is of an age capable of expressing an independent opinion. What this phrase "paramount consideration" means is simply an "overriding consideration". "It connotes a process whereby, when all the relevant facts, relationships, claims and wishes of the parents, risks, choices and other circumstances are taken into account and weighed the course to be followed will be that

which is most in the interest of the children's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed." per Lord MacDermott in *J & Anor. v. C. & Ors.* [1970] AC 668, 710-711, followed in *Mahabir Prasad v. Mahabir Prasad* [1982] 1 MLJ 189 at p. 193.

Further, sub-section (4) also provides that where there are two or more children of a marriage, the Court shall not be bound to place both or all in the custody of the same person, but the Court shall consider the welfare of each child independently.

On the question of maintenance, s. 93 clearly provides that the Court may order payment of maintenance for the benefit of a child if the person has refused or neglected reasonably to provide for the child, if he has deserted his wife and the child is in her charge during the pendency of any matrimonial proceedings; or when making or subsequent to the making of an order placing the child in the custody of any other person. Be it also noted here, the plaintiff is also applying for maintenance for herself.

Conclusion

After considering the opposing affidavits and further evidence of both the plaintiff and the defendant and after talking to the children privately in chambers my conclusions are as follows. First, I accept the plaintiff's reasons for finding it intolerable to live and cohabit with the defendant and thereby leaving the matrimonial home. In my view, no decent and respectable wife would tolerate the defendant's behaviour in carrying on an affair with Rosalind Lee to the extent of permitting her to stay overnight in the matrimonial home. This was done openly. Quite rightly, the defendant denied the plaintiff's allegation that he had committed adultery with Rosalind. But on the other hand, he never denied that she had frequented the matrimonial home and on occasions stayed overnight.

Secondly, despite attempts for reconciliation at the instance of the defendant, it seems clear to me that the plaintiff would not return to the matrimonial home even for the sake of the children.

Thirdly, the plaintiff who is presently working as a seamstress with a salary of RM300 per month was prepared to abandon her job in order to look after the children.

Fourthly, the plaintiff admitted that her father's flat was unsuitable for her children. Hence, if custody is given to her she would look for a rented house for her and the children to stay. This would mean that she had to depend on the maintenance from the defendant to pay for the rent and for the upkeep of the children.

Fifthly, she conceded that the children are quite comfortable staying with the defendant at the matrimonial home, which is a semi-detached house with five bedrooms.

Finally, after observing the children, I found them to be attached to one another and they appeared happy.

Next, looking at the defendant's case, he not only wanted custody of the children but also reconciliation with the plaintiff. He seemed to promise the plaintiff that for the sake of the children he would discontinue his relationship with relationship with Rosalind Lee and the plaintiff should then return to the matrimonial home. On custody, he relied on the *status quo* of the children. From the defendant's evidence, I accept as a fact that the children are at the moment better off remaining at the matrimonial home. They are attending different schools and are provided with transportation and extra tuition.

Thus, based on the above conclusions and having regard to the wishes of all parties concerned, in the final analysis the welfare of the children must inevitably be the paramount consideration. Therefore, in my judgment, the four children are better placed with the defendant at the matrimonial home. Here, I am more concerned with keeping the *status quo* of the children bearing in mind this application is for an interim order. Since the mother walked out from the matrimonial home three years ago, the children have continued to live together as brothers and sister in the same house. They impress me to be getting on together very well. The youngest child seems to be full of smiles. They are schooling and are given extra tuition. One cannot deny the fact that they are quite comfortable staying in a semi-detached house with five bedrooms. Granted that the defendant would be out of the house for work for most of the day, there was no suggestion that he was incapable of taking care of the four children and looking after their needs. In addition, I have also considered the question of splitting the four children, two to be given to the plaintiff and other two to the defendant. However, in view of the fact that they have been together all these time, it will not be conducive to separate them, which may perhaps affect them emotionally.

On the other hand, the plaintiff who is now employed as a seamstress wanted the children to be with her so that she would take good care of them. As she was prepared to sacrifice her job for the sake of the children, it would mean that she would have to depend solely on the maintenance money to be provided by the defendant (upon order of the Court). She would then have to look for a rented house suitable for the children and would arrange for them to go to school in school buses. Again, all these expenses would have to come from the maintenance. It must be remembered that the Court here is dealing with the children's future and anxiously trying to resolve how best they could be settled in the face of two warring parents. Therefore, would the plaintiff be capable of giving better care simply living on the monthly maintenance to be provided by the defendant? There is uncertainty regarding the suitability and the locality of a rented house, thus requiring readjustment on the part of the children. Then, what about the food, clothings and books, extra tuition and the daily bus fares of the children? Would all these expenses be sufficiently covered by the maintenance to be provided by the defendant? All in all, I find that the desire of the plaintiff to have an interim custody of the four children cannot override the *status quo* of the children. In the circumstances of the whole case, I am of opinion that the children's interest and welfare are better served by them remaining with the defendant at the matrimonial home. The plaintiff shall no doubt have reasonable access to the children upon such terms as the parties may agree.

With regard to the plaintiff's application for maintenance for herself, s. 77(1)(a) provides that the Court may order a man to pay maintenance to his wife or former wife during the course of any matrimonial proceedings. In my view, a matrimonial proceeding is any proceeding commenced under Part VI of the Act, namely petitions for divorce, judicial separation and for nullity of marriage. Hence, as the plaintiff has yet to issue any of the above-mentioned petitions, she cannot be granted any relief by way of maintenance.

The plaintiff's application for custody of the four children and maintenance for herself is accordingly dismissed with costs.

Also found at [1990] 2 CLJ 268